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No. 80-1695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

J. E. PALAEZ DEL CASAL and EASTERN AIR LINES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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80

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
1. The Government's argument in support of Plaintiff's damage recovery flies in the face of *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967), and its progeny which hold that to recover damages against either the employer or the union an employee must establish not only a breach of DFR but also breach of the collective bargaining agreement	2
2. Application of ALPA's policy limiting staff counsel to grievants who are dues or agency fee payors does not violate DFR under the Railway Labor Act in any event	5
3. The Government's Brief does not speak authoritatively with respect to the Railway Labor Act	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

Buchholtz v. *Swift & Co.*, 609 F.2d 317 (C.A. 8, 1979), *reh. den.* —— F.2d ——, 102 LRRM 2219, *cert. denied*, 444 U.S. 1018 3
Clayton v. *Automobile Workers*, 101 S.Ct. 2088 (1981) 2
Cronin v. *Sears, Roebuck & Co.*, 580 F.2d 616 (C.A. 8, 1978) 3
Czosek v. *O'Mara*, 397 U.S. 25 (1970) 3
Deboles v. *Trans World Airlines*, 552 F.2d 1005 (C.A. 3, 1977), *cert. denied*, 434 U.S. 837 2
Electrical Workers v. *Foust*, 442 U.S. 42 (1979).. 3, 6, 7
Hines v. *Anchor Motor Freight*, 424 U.S. 545 (1976) 2, 4, 7
Hughes Tool Co., 104 N.L.R.B., 318 (1953) 5, 6, 7
International Assn. of Machinists, Local 679 (Canfield Rubber Co.), 223 N.L.R.B. 832 (1976) 5, 6, 7
Kesner v. *National Labor Relations Board*, 532 F.2d 1169 (C.A. 7, 1976) 4, 5
Retail Clerks v. *Schermerhorn*, 373 U.S. 746 (1963) 6
St. Clair v. *Local Union No. 515, Teamsters*, 422 F.2d 128 (C.A. 6, 1969) 2
Truck Drivers, Oil Drivers, Etc., Local 705 (Aaron Kesner), 209 N.L.R.B. 292 enforced, 532 F.2d 1169 (C.A. 7, 1976), *cert. denied*, 429 U.S. 1022.. 3
United Parcel Service v. *Mitchell*, 101 S.Ct. 1559 (1981) 2, 4
Vaca v. *Sipes*, 386 U.S. 171 (1967) 2, 5, 6, 7
Wyatt v. *Interstate & Ocean Transp. Co.*, 623 F.2d 888 (C.A. 4, 1980) 2, 3

Statutes

National Labor Relations Act
§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 7
§ 14(a), 29 U.S.C. 164(a) 7
Railway Labor Act
§ 3 First (i)(j), 45 U.S.C. 153 First (i)(j).. 6

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This supplemental brief is filed pursuant to Rule 22.6 in light of the Brief for the United States as *Amicus Curiae.*

INTRODUCTION

Following his discharge from employment as an airline pilot, Plaintiff Del Casal initiated a grievance against his employer, Eastern Airlines. ALPA took all steps necessary to assure Plaintiff a System Board arbitration hearing, but advised him that due to its policy limiting staff counsel to dues and agency fee payors, it could not provide him staff counsel at the System Board. Plaintiff accordingly retained counsel who represented him before the System Board which sustained his discharge. Plaintiff sued to vacate the Board decision, alleging that his discharge violated the collective bargaining agreement

and that refusal of staff counsel was a breach of ALPA's duty of fair representation which vitiated the finality of the arbitration decision. The courts below, though upholding the arbitral rejection of Plaintiff's grievance and rejecting Plaintiff's assertion that refusal of staff counsel prejudiced the arbitration result, held that ALPA's refusal of staff counsel was a breach of DFR and that Plaintiff was entitled—despite the lack of harm to his employment rights—to recover as damages the counsel fees incurred to his retained counsel.

ARGUMENT

1. *The Government's argument in support of Plaintiff's damage recovery flies in the face of Vaca v. Sipes, 386 U.S. 171, 197 (1967), and its progeny which hold that to recover damages against either the employer or the union an employee must establish not only a breach of DFR but also breach of the collective bargaining agreement.*[1] The Government's argument is based pri-

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[1] *Hines* v. *Anchor Motor Freight*, 424 U.S. 545, 570-71 (1976); *United Parcel Service* v. *Mitchell*, 101 S.Ct. 1559, 1563 (1981); *Clayton* v. *Automobile Workers*, 101 S.Ct. 2088 (1981). Most recently the Court in *Clayton* stated:

> ". . . . As we stated in *Vaca* v. *Sipes*, *supra*, 386 U.S., at 197-198, an employee who establishes that the union breached its duty of fair representation in processing his grievance, *and that the employer breached the collective-bargaining agreement*, may be entitled to an award of damages
>
> > 'apportion[ed] . . . between the employer and the union according to damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.'" *Clayton*, 101 S.Ct. at 2096, n. 15 (emphasis added).

See *Deboles* v. *Trans World Airlines*, 552 F.2d 1005, 1018 (C.A. 3, 1977), *cert. denied*, 434 U.S. 837; *Wyatt* v. *Interstate & Ocean Transp. Co.*, 623 F.2d 888, 892 (C.A. 4, 1980); *St. Clair* v. *Local*

marily on *Czosek* v. *O'Mara*, 397 U.S. 25, 28-29 (1970), which, it says, established "that a fair representation suit has an existence separate from an action against an employer for wrongful discharge" (Govt. Br. 8). The Government misunderstands this "separate . . . existence." While *Czosek* allows employees to proceed separately against the union, it no more suggests the union could be held liable for damages absent violation of the employees' rights under the collective bargaining agreement than that an employer who prevailed in arbitration could be held liable for damages absent a DFR breach undercutting arbitral finality. *Czosek* explained that an apportioned share of damages may be imposed upon a union which violates the DFR, assuming "a wrongful discharge by the employer", 397 U.S. at 29, and is no precedent for the imposition of any damages when the employee's discharge, after a fair hearing, is upheld. Indeed, the Fourth Circuit recently cited *Czosek* as authority to the contrary, *Wyatt*, *supra*, 623 F.2d at 892.

The Government's reliance on *Electrical Workers* v. *Foust*, 442 U.S. 42 (1979) is similarly misplaced. While we agree that the "right to bring fair representation suits is implied by the Railway Labor Act" (Govt. Br. 8), nothing in *Foust* suggests deviation from the rule of *Vaca*. Rather, *Foust* emphasized that: "The fundamental purpose of fair representation suits is to compensate for injuries caused by violations of employees' rights." 442 U.S. at 48-49. The "compensation principle" *id.* of *Foust* thus precludes any damage recovery to a plaintiff like Del Casal whose employment rights have not been violated. *Truck Drivers, Oil Drivers, Etc.*,

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Union No. 515, Teamsters, 422 F.2d 128, 132 (C.A. 6, 1969); *Cronin* v. *Sears, Roebuck & Co.*, 588 F.2d 616, 619 (C.A. 8, 1978); *Buchholtz* v. *Swift & Co.*, 609 F.2d 317 (C.A. 8, 1979), *reh. den.* —— F.2d ——, 102 LRRM 2219, 2226, *cert. denied*, 444 U.S. 1018.

Local 705 (*Aaron Kesner*), 209 N.L.R.B. 292, enforced, 532 F.2d 1169 (C.A 7, 1976), *cert. denied*, 429 U.S. 1022, on which the Government also relies (Govt. Br. 8), is thoroughly consistent with our understanding of *Vaca*. In *Kesner*, the Board, though finding that the union's misconduct during arbitration was a breach of DFR, refused to grant an affirmative, monetary remedy against the union. It refused precisely because it determined that Kesner's underlying grievance—as here—was without merit, see *Kesner* v. *National Labor Relations Board*, 532 F.2d 1169, 1175 (C.A. 7, 1976). Plainly, *Kesner* supports our view that absent an underlying, meritorious grievance against the employer, a DFR complainant may not consistent with *Vaca* and its progeny recover damages.[2]

Neither the Government nor Del Casal cites a single case allowing damage recovery for breach of DFR to a plaintiff who fails to show a violation of employment

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[2] The Government (p. 8, n. 4) attacks the reading of *United Parcel Service* v. *Mitchell*, 101 S.Ct. 1559 (1981) presented in our Reply Brief (2-3), but in doing so mistakenly takes the views stated in Justice Stevens' separate opinion as authoritative.

The Court's disposition in *United Parcel Service*, contrary to the Government, was a declaration that the district court had been correct in granting summary judgment—which had been entered on behalf of the union as well as of the employer—and an unqualified reversal of the Second Circuit's judgment to the contrary, 101 S.Ct. at 1565. Contrary to Justice Stevens' separate views, 101 S.Ct. at 1569, n. 4, the Court's decision confirms that an employee seeking to recover damages against the employer or the union—either jointly or separately, *Czosek*, *supra*—must show *both* a breach of contract by the employer and a breach of DFR by the union:

> ". . . *'To prevail against either the company or the Union, [the plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union . . . .'*" *United Parcel Service* v. *Mitchell*, 101 S.Ct. at 1563, quoting *Hines* v. *Anchor Motor Freight*, 424 U.S. 545, 570-71 (1976) (emphasis added).

rights under the collective bargaining agreement. Their failure to do so is perhaps the strongest indication that the Court of Appeals erred in allowing such a recovery here.

2. *Application of ALPA's policy limiting staff counsel to grievants who are dues or agency fee payors does not violate DFR under the Railway Labor Act in any event.* The Government stresses that DFR applies equally to *administration* and *negotiation* of the labor agreement (Govt. Br. 3-5)—again, we fully agree—but ignores that the consistent focus of this Court's DFR decisions has been to guard against harm to employment rights which could occur should a union "arbitrarily ignore a meritorious grievance or process it in perfunctory fashion." *Vaca* v. *Sipes*, *supra*, 386 U.S. at 190-91 (Petition, 5 *et seq.*) No decision of this Court has ever held DFR breached under either the Railway Labor Act or the National Labor Relations Act where a union having taken all steps necessary to assure an aggrieved employee's access to the arbitration forum supply refuses to provide him with an advocate. As we have shown, union refusals to provide counsel have been upheld in every context where they have previously been challenged (Petition, 10-11).

The only cases in the Government's Brief even close on their facts to this one are two decisions of the National Labor Relations Board, *Hughes Tool Co.*, 104 N.L.R.B. 318, 325-26 (1953) and *International Assn. of Machinists, Local 679 (Canfield Rubber Co.)*, 223 N.L.R.B. 832, 835-36 (1976), which the Government cites for the proposition that "a union cannot charge a non-member a fee to cover the expense of processing his grievance if it provides the same services to members without charge." (Govt. Br. 5-6).[3] The unions in those cases, however,

[3] *Kesner*, *supra*, also cited by the Government, demonstrates that where, as here, the employee's underlying grievance is without merit, the NLRB—consistent with *Vaca*—would not order monetary relief against the union for a breach of DFR.

had not only refused to provide service of a union representative in connection with non-members' grievances, but had also denied access to contractually-established arbitration forums as well. The cited NLRB decisions are thus not applicable to this case in which ALPA took steps necessary to assure Plaintiff a full and fair arbitration hearing, which he in fact received, though represented by his own, rather than union staff, counsel.

3. *The Government's Brief does not speak authoritatively with respect to the Railway Labor Act.* We submit that the Government's brief fails to explore differences between the Railway Labor Act and the National Labor Relations Act strongly suggested by this Court's previous decisions. Most notably, as the Court recognized in *Vaca, supra*, 386 U.S. at 174, n. 3, NLRA does not guarantee individual employees the right to invoke arbitration where, as is typically the case, access to arbitration is placed by contract in the union's control. If, as the Court stated in *Foust, supra*, 442 U.S. at 49, n. 11, §§ 3 First (i) (j) of RLA, 45 U.S.C. 153 (i) (j), allow individuals to proceed to a System Board independently of the union, then the concerns voiced by the NLRB in *Hughes Tool* and *Canfield Rubber*, where access to arbitration is controlled by the union, would not apply.

The Government's lack of credentials to speak regarding RLA is further demonstrated by its blatantly incorrect assertion that if ALPA's contract with Eastern had contained a union security provision requiring payment of dues or agency fees as a condition of continued employment, such a provision would violate the Florida Constitution (Govt. Br. 7, n. 3). For this proposition, the Government cites *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 750 (1963), an NLRA case. Incredible as it may seem, the Government is apparently unaware that

RLA specifically sanctions union security provisions and contains no provision parallel to § 14(a) of NLRA, 29 U.S.C. 164(a), subjecting such provisions to state law. As such, the RLA policy of discouraging "free riders" is markedly stronger than that evidenced by NLRA.[4]

We submit that ALPA's policy of limiting the expensive service of staff counsel to dues and agency fee payors is a reasonable rule consistent with the broad discretion heretofore reserved to unions in the performance of their statutory responsibilities, consonant with the strong Railway Labor Act policy of discouraging "free riders", and wholly consistent with ALPA's duty of fair representation. The Court of Appeals' *per se* rule that such policies necessarily violate the Railway Labor Act, we submit, finds no support in decisions of this Court or other courts of appeals, or even in decisions of the NLRB applying the NLRA. Finally, the Court of Appeals' upholding of a damage recovery absent any underlying violation of Del Casal's employment rights is contrary to the rule established in *Vaca* and *Hines*, and contrary to the compensation principle articulated by this Court in *Foust*.

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[4] The Government though invited to present its views in this RLA case has responded, as to the content of DFR, with NLRA cases not even directly involving the DFR. *Hughes Tool Co.* was a proceeding on petition to revoke certification and *Canfield Rubber Co.* applied § 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A), neither of which has a specific analog in RLA.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted; the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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